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Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. ...72-972

THE WESTERN RAILWAY OF ALABAMA,
A Corporation,
Petitioner,

v.

JOHNNIE F. BLUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
For the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
For the Fifth Circuit

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case on November 21, 1972.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (App. A, *infra*, p. A-1) is not yet reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit (App. B, *infra*, p. A-23) was entered on November 21, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

1. In a personal injury action brought under the Federal Employers' Liability Act (45 U.S.C. §§ 51-60) and the Federal Safety Appliance Act (45 U.S.C. § 11) has the district court committed reversible error, as held by the court of appeals, in requiring that a computation of impaired future earnings should be based on net earnings after taxes rather than on gross earnings?

2. In this action, did the district court commit reversible error, as held by the court of appeals, when it charged the jury that the appropriate method of reducing to present value any award for impairment of future earning power involved a determination of the correct amount of money earned through a reasonable rate of interest over a period of plaintiff's work life expectancy; involved a determination of what the current earning power of money would be in the locality of plaintiff's residence upon investments in safe securities by someone of plaintiff's financial experience and skill; and that the jury should be guided in its determination, but not bound, by expert testimony which had been admitted at the trial?

3. Is it necessary for this Court to lay down a uniform rule for determination of the matters involved in Questions 1 and 2 in order to insure a correct and uniform application of the Federal Employers' Liability Act and Federal Safety Appliance Act in all federal and state courts, and in order to safeguard the rights of litigants under those federal acts to receive similar treatment in all states?

4. In the personal injury action described in Questions 1 and 2, when the court of appeals has found the defenses "not insubstantial", has that court erred in setting aside a jury verdict which awarded $76,780 to plaintiff?

STATUTORY PROVISIONS INVOLVED

Statutory provisions involved, Federal Employers' Liability Act (45 U.S.C. § 51) and Federal Safety Appliance Act (45 U.S.C. § 11), are set forth in App. C, *infra*, p. A-25).

STATEMENT OF THE CASE

Respondent (hereinafter "Blue"), claiming negligence on the part of Petitioner (hereinafter "Western") under the Federal Employers' Liability Act and a violation by it of the Federal Safety Appliance Act,[1] sued for damages arising out of injuries which he suffered on June 26, 1970. Western denied the allegations asserting liability under either Act; averred that the sole proximate cause of Blue's injuries was his own negligence; and averred further that Blue's contributory negligence was a defense in mitigation of damages under FELA. A jury trial was had below; Western's motions for a directed verdict at the close of plaintiff's evidence and at the close of all of the evidence were denied; the jury found "the issues in favor of [Blue]" and awarded him damages of $76,780 (R. 57); judgment was entered on the verdict in this amount plus costs (R. 58); and Blue's post-trial motion for a new trial was denied (R. 62). Blue appealed. **The Fifth Circuit reversed because it found that the district court had erred in matters involving the computation of damages for impairment of future earning power.**

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[1] Throughout this petition the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60, will be referred to as FELA; and the Federal Safety Appliance Act, 45 U.S.C. § 11, will be referred to as FSAA.

Blue was injured in the following circumstances. He was a switchman whose duties were to line switches so that when cars were cut loose from the train which was being broken down, they could be shunted onto tracks in accordance with a switching list which each member of the train crew had. Immediately preceding the events which led to the accident, Blue had lined a switch so that three hopper cars which the engineer was to "kick" down the lead track would go into sidetrack No. 6 (R. 219). When the three cars passed the switch Blue threw this switch so that the next car scheduled to come down the lead track would continue on the lead past track 6 until it reached another sidetrack 10 where the next car was scheduled to go (R. 15). But when Blue threw the first switch, the three hoppers had not cleared the lead track. Blue first noticed what had occurred when the next car, a loaded wood rack (moving at about 5 miles per hour) was on its way down the lead track, at a point several hundred feet before reaching the first switch (R. 184 and 218). Instead of going back to switch 6 and relining it for track 6 so that the wood rack could couple with the hopper on impact, Blue ran to the wood rack car and jumped on it to try to stop the car by handbrake. He was unable to do so before the wood rack collided with the hopper which was protruding onto the lead; and he was badly injured in the collision.[2]

Western contended that the entire accident was caused solely by Blue's failure to do his duty of remaining at switch 6 until he was sure that the three hopper cars had cleared the lead; and that had he done so, he would have been able to turn switch 6 back and shunt the wood

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[2] Blue, who is righthanded, suffered injuries necessitating the ultimate amputation of his left arm below the elbow. Testimony as to the percentage of Blue's permanent overall disability ranged from a 25% to 30% opinion of Blue's orthopedic surgeon, Dr. Barnes (R. 370), to 32% contained in a Bureau of Labor Statistics study (R. 370 and Defendant's Exhibit 6).

rack onto track 6 where it would have coupled on impact with the protruding hopper without injury to any person or property. Moreover, Western contended that Blue could still have returned to switch 6 after he became aware of the protrusion of one of the cars onto the lead track, and performed the same operation without danger —for by his own admission, he was closer to switch 6 when he became aware of the situation than he was to the moving wood rack. Blue, indeed, left two places of safety and jumped on a moving wood rack in an attempt to stop it without allowing enough time and space to do so. Finally, Western contended that Blue could have jumped off the moving wood rack—even as he had jumped on it—when he became aware that he had not allowed enough time and space for stopping the moving loaded car with a handbrake.

Western met Blue's proof of a violation of the FSAA with the contention that the handbrake was not defective and that Blue had not allowed sufficient time and space for the handbrake—operating in its "normal, natural, and usual manner,"[2] . . . to stop the loaded wood rack car which was moving at five miles per hour when he jumped on it—climbed the ladder—got on the brake platform—and began to apply the handbrake.

The only alleged error asserted by Blue's counsel in the court of appeals relates to determinations by the district court of the correct method of ascertaining damages for impairment to Blue's future earning capacity. Blue's counsel argued that the district court erroneously determined that Blue's net wages after taxes, rather than his gross wages before taxes, should be used in this com-

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[2] **Myers v. Reading Co.**, 331 U.S. 477; **T.&P. Ry. Co. v. Griffith**, 265 F.2d 489 (5th Cir. 1959); **Didinger v. Pennsylvania R. Co.**, 39 F.2d 798 (6th Cir. 1930); **Spotts v. B.&O. R. Co.**, 102 F. 2d 160 (7th Cir. 1939); **Detroit, etc. R. Co. v. Hahn**, 47 F.2d 59 (6th Cir. 1931).

putation; and that the district court, moreover, specified that any such loss of wages computed over Blue's life expectancy should be discounted for present value at the current rate of return which a prudent person of Blue's experience and skill might obtain on a safe investment at current investment rates.

The Fifth Circuit held that the district court "erred in excluding from the jury's consideration evidence of Blue's gross earnings history and in instructing the jury that, in making an award for future loss of earnings, they were to concern themslves only with net income. The jury should have been permitted to receive the evidence as to gross earnings offered by [Blue]" (Opinion, p. 23, footnote omitted).

The Fifth Circuit also held that the district court "erred in instructing the jury to reduce any award for loss of future earnings through the utilization of an interest rate equivalent to the return on high-grade corporate securities **prevailing at the time and place of the trial**" (Opinion, p. 24. Emphasis by the Court).

Because of these asserted errors the Fifth Circuit reversed the judgment of the district court and remanded the case for a new trial; and, because it found Western's defense "was not insubstantial," it remanded for a new trial on all issues, liability as well as damages, since, in the circumstances of this case, it felt that Western would be prejudiced by a partial reversal.

REASONS FOR GRANTING THE WRIT

The correct method of computing damages for impairment or total loss of future earning capacity in suits arising under the Federal Employers' Liability Act and the Federal Safety Appliance Act is surely a matter of paramount importance in the proper, evenhanded, and efficient judicial application of those federal statutes. This Court has granted certiorari in order to insure "a correct and uniform application of the federal act in the state and federal courts." **Brown v. Western Railway**, 338 U.S. 294, 295. This Court, exercising its certiorari jurisdiction in cases such as this, has emphasized that "[o]nly by a uniform federal rule . . . may litigants under the federal act receive similar treatment in all states." **Brady v. Southern R. Co.**, 320 U.S. 476, 479. And this Court has held appropriate for review questions involving the construction or scope of these federal statutes. **Minneapolis etc. R. Co. v. Bombolis**, 241 U.S. 211; **Southern Pac. Co. v. Gileo**, 351 U.S. 493; **Reed v. Pennsylvania R. Co.**, 351 U.S. 502. Finally, this Court has even granted certiorari to review evidentiary matters to determine whether lower federal and state courts have deprived "litigants of their right to a jury determination." **Rogers v. Missouri P. R. Co.**, 352 U.S. 500, 510.

As will be demonstrated, the decision of the court of appeals below, on the matters which caused it to reverse the judgment of the district court, conflicts with decisions of other federal courts of appeal on the same questions. As noted, the court of appeals below has decided important questions of federal law involving FELA and FSAA which have not been, but should be, settled by this Court; and insofar as some of the matters which form the basis of the decision of the court of appeals below have been decided by this Court, that decision conflicts with applicable decisions of this Court.

1. The decision below conflicts with the decisions of other Courts of Appeals on the question of whether a computation of impaired future earnings in an FELA or FSAA case should be based on net earnings after taxes rather than on gross earnings.

The Fifth Circuit took the singular step of reversing a district court for adopting and following a respectable line of authority that computation of impaired future earnings in an FELA case should be based on a plaintiff's net income after taxes rather than on his gross earnings. The Fifth Circuit conceded that, while it had declined theretofore to reverse a district court for adopting the contrary theory that impairment should be based on gross earnings, it had "not previously considered this precise issue" of whether a district court had erred in adopting and applying the net income method. (Opinion, p. 21) Thus the Fifth Circuit has pronounced for the first time that a district court in that circuit has no discretion in a jury case to use the net income theory, even though there is such discretion in district courts in other circuits, and even though in non-jury cases a district court in the Fifth Circuit would be **required** to employ this very net income computation. **Hartz v. United States**, 415 F.2d 259, 264 (5th Cir. 1969).

The Fifth Circuit candidly concedes a split of authority on the question of whether the net income or gross income method is preferable. It chose "the rule enunciated in **McWeeney.**"[4] But there is even a split in the views of the judges who participated in **McWeeney**. The court of appeals below quoted at length from Judge Friendly's majority opinion. (Opinion, pp. 14-21)

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[4] Opinion, p. 22. "**McWeeney**" is **McWeeney v. New York, etc. R. Co.**, 282 F.2d 34 (2d Cir. 1960).

But Judge Lumbard dissented in **McWeeney** for reasons which District Judge Johnson at bar also found persuasive: (282 F.2d at 42)

> "We are much more certain of the continuance of federal income taxes in 1960 than we were in 1944. In our own circuit Connecticut has recognized the charge as proper. Floyd v. Fruit Industries, 1957, 144 Conn. 659, 136 A.2d 918, 63 A.L.R.2d 1393. There is a full discussion by Morris and Nordstrom in Personal Injury Recoveries and the Federal Income Tax Law, 46 A.B.A. Journal 274, in which the authors develop the arguments in favor of giving charges such as 17 and 18. See also Harper & James, The Law of Torts, § 25.12."

Indeed, one must be intrepid to assert a firm rule of the Second Circuit. In **McWeeney** that court candidly wrote that sometimes there should be a deduction for income taxes and sometimes not; that this uncertainty, while "lacking precision and elegance," was no more "untidy" than the "life with which it deals"; and that its **O'Connor v. United States**, 269 F.2d 578, was contrary to its earlier **Stokes v. United States**, 144 F.2d 82—which it did not overrule—but that the court continued to adhere to **Stokes** except that sometimes it would not.[5] Later Second Circuit cases afford little clarification. See **Petition of Marina Mercante Nicaraguense**, 364 F.2d 118, 125; **Cunningham v. Rederiet Vindeggen**, 333 F.2d 308, 313; **Ryan v. United States Lines Co.**, 303 F.2d 430, 434. Moreover, in **Cunningham**, Judge Moore dissented (333 F.2d at 319):

> "The trial court here believing that 'The recent trend in decisions favors the deduction of income taxes' based his computation upon decedent's net income. In so doing, the court relied primarily upon

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[5] 282 F.2d at 39.

our O'Connor decision but as to trend referred to Floyd v. Fruit Industries, 144 Conn. 659, 136 A.2d 918, 63 A.L.R.2d 1378 (1957) and British Transport Com. v. Gourley [1956], A.C. 185, 2 W.L.R. 41 [1955]."

The Fifth Circuit noted that "several of its sister courts of appeal have arrived at a similar conclusion" (Opinion, p. 23, n. 8). One of the cases cited, **Cox v. Northwest Airlines, Inc.**, 379 F.2d 893 (7th Cir. 1967) lends dubious support. There one finds (379 F.2d at 896):

> "This is a case where the impact of income tax has a significant and substantial effect in the computation of probable future contributions and may not be ignored. While mathematical certainty is not possible, any more than it is in a prognosis of life expectancy and probable future earnings, nevertheless, an estimate may be made based generally on current rates, from which there should be computed the future income of the deceased after payment of Federal Income Taxes rather than before. O'Connor v. United States, 2 Cir., 269 F.2d 578, 584."

Moreover, the Seventh Circuit earlier spoke clearly in **Wetherbee v. Elgin, Joliet and Eastern Ry. Co.**, 191 F.2d 302, 311 (7th Cir. 1951). It held that although mortality tables were admissible, an actuary should not be permitted to make calculations multiplying decedent's **gross earnings** by his life expectancy. The court held that this procedure was prejudicially erroneous because it was not based on his **take home pay after income tax** and railroad retirement deductions had been made.

The holdings of other circuits conflict with the Fifth Circuit's decision. The Ninth Circuit, in **United States v. Furumizo**, 381 F.2d 965, 971 (9th Cir. 1967) held:

> "The old saw about the certainty of taxes is still good. It is reasonably certain that what would have

been available would have been after-tax dollars, not pre-tax dollars. See Southern Pacific Co. v. Guthrie, 9 Cir. 1951, 186 F.2d 926. We think that, at the least, the court could take this fact into consideration, although it might not have erred if it had refused to do so."

The **Southern Pacific Co. v. Guthrie** case, 186 F.2d 926 (9th Cir. 1951), squarely conflicts with the Fifth Circuit's decision, and accords with the district court's determination at bar. In the first appellate decision, 180 F.2d 295, 302, the Ninth Circuit held:

> "Appellant argues that in any calculation of loss of earnings we must throw out the amounts to be paid in taxes, in other words, confine his loss to his reasonably to be expected 'take-home' pay. Counsel for Guthrie challenge this, as they say the amount of taxes is purely speculative, and cite Stokes v. United States, 2 Cir., 144 F.2d 82, which seems to support them. **We think, however, that for the expected period of Guthrie's life, he would have found taxes fully as certain as his prospect of continued earnings.** In 1946 his net taxes were $524.90. We think that the record will not establish a possible loss of earnings in excess of $6,000 per year **after taxes.**" (Emphasis supplied.)

On rehearing before the full court, 186 F.2d 926, 927, the correctness of the net-after-taxes rule was reaffirmed:

> "We think the Court's view that the net take home pay, after taxes, would represent the actual loss, is correct * * *."

The **Stokes** case, 144 F.2d 82, the fountainhead of rulings in the Second Circuit, was expressly disclaimed as authority by the Ninth Circuit in **Guthrie.**

In **Armentrout v. Virginian Ry. Co.**, 72 F.Supp. 997 (D. W. Va. 1947),[6] the court upheld the deduction of income taxes and stated the rule for determining damages in a personal injury case as follows (at 1004):

> "Plaintiff's estimated potential earnings over and above his estimated actual earnings in his crippled condition must be calculated as a net amount; that is, **from his estimated potential gross earnings there must first be deducted an amount equivalent to his estimated income tax, and the remainder must be further reduced by the amount of his estimated actual earnings in his crippled condition.** This net figure represents the annual estimated net earnings lost by plaintiff." (Emphasis supplied)

Further emphasizing the need for a definitive pronouncement from this Court, it is ironic that had this case been tried under FELA in an Alabama state court, and had a state trial judge ruled as the district court below, the Supreme Court of Alabama would have affirmed—not reversed. For in **Atlantic Coast Line R. Co. v. McMoy**, 261 Ala. 66, 73 So.2d 85, a death action under FELA, a verdict for plaintiff of $47,500 was reduced to $30,000 on motion for new trial. Approving the remittitur, the court stated (at 73):

> "Her testimony shows that her husband averaged $350 per month **of take home pay, after payment of income tax,** relief and railroad retirement. . . . We feel sure that on the motion for a new trial the various figures were considered by the court when a reduction was ordered in the amount of the verdict." (Emphasis supplied.)

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[6] Considered by the Fourth Circuit for the second time, 166 F. 2d 400, 407 (4th Cir. 1948) and reversed, *inter alia*, because the district judge failed to set aside an excessive verdict.

This Court should eliminate the unequal results which are the inevitable product of conflicting decisions among the courts of appeals on the vital question of measurement of impaired earning capacity in FELA and FSAA actions. Moreover, since lawsuits arising under these federal statutes may be tried in either state or federal courts at the plaintiff's choice, this unfortunate disharmony may be still further compounded by state appellate courts. Only this Court can speak authoritatively. These conflicts impel the grant of certiorari to review the judgment below.

2. **The holding of the court of appeals below regarding the method of reducing to present value any award for impairment of future earning power conflicts with decisions of other courts of appeals and with decisions of this Court.**

It is difficult to follow that portion of the decision below entitled "The Appropriate Interest Rate" (Opinion, pp. 23-25). Moreover, its citation of **C.&O. R. Co. v. Kelly**, 241 U.S. 485, is misplaced. The economic and legal theory involved in this process is a rather simple one, and its application in FELA cases has been required at least since **Kelly**. Since a plaintiff is seeking **now** an award for loss of anticipated wages over the entire period of his life expectancy, there must be a reduction of this anticipated amount so as to take into account its earning power beginning **now** and extending over the plaintiff's work life expectancy at investment rates in safe securities reasonably available to a plaintiff **now**. The principle is explained at some length in **Kelly** (241 U.S. at 490-491):

> "So far as a verdict is based upon the deprivation of future benefits, it will afford more than compensation if it be made up by aggregating the benefits without taking account of the earning power of the money that is presently to be awarded. It is self-evident that a

given sum of money in hand is worth more than the like sum of money payable in the future. Ordinarily a person seeking to recover damages for the wrongful act of another must do that which a reasonable man would do under the circumstances to limit the amount of the damages [citations] and the putting out of money at interest is at this day so common a matter that ordinarily it cannot be excluded from consideration in determining the present equivalent of future payments, since a reasonable man, even from selfish motives, would probably gain some money by way of interest upon the money recovered. Savings banks and other established financial institutions are in many cases accessible for the deposit of moderate sums at interest, without substantial danger of loss; the sale of annuities is not unknown; and, for larger sums, state and municipal bonds and other securities of almost equal standing are commonly available.

"Local conditions are not to be disregarded, and besides, there may be cases where the anticipated pecuniary advantage of which the beneficiary has been deprived covers an expectancy so short and is in the aggregate so small that a reasonable man could not be expected to make an investment or purchase an annuity with the proceeds of the judgment. But, as a rule, and in all cases where it is reasonable to suppose that interest may safely be earned upon the amount that is awarded, the ascertained future benefits ought to be discounted in the making up of the award.

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"We are not in this case called upon to lay down a precise rule or formula, and it is not our purpose to do this, but merely to indicate some of the considerations that support the view we have expressed that, in computing the damages recoverable for the

deprivation of future benefits, the principle of limiting the recovery to compensation requires that adequate allowance be made, according to circumstances, for the earning power of money; in short, that when future payments or other pecuniary benefits are to be anticipated, the verdict should be made up on the basis of their present value only."

Ever since the **Kelly** case, federal courts have required such discounting to present value of an award for loss of future earnings. The simplified process was explained by Judge Friendly in **McWeeney**, 282 F.2d at 35, n. 3. There the court outlined the elements involved in determining damages from loss of earning power. In a total disability case these are "future normal earning power, expectancy, and discount factor." In a partial disability case "there is a fourth, plaintiff's post-accident earning power."

In **Sleman v. C.&O. Ry. Co.**, 414 F.2d 305 (6th Cir. 1969) the court reversed the damage computation of a district judge sitting without a jury because he had not reduced his award of damages to present worth on the ground that "inflationary trends would offset any present worth reduction" (414 F.2d at 307). The district court was ordered to recompute damages for future earnings based on the present worth formula of **Kelly**. The court's reasoning is most persuasive (414 F.2d at 308):

> "Of course, the nation's economic history since the 1930's would appear to make the use of present wages as the standard for loss of future earnings somewhat unfair to plaintiffs. But as to the future, the inflation versus deflation debate rages inconclusively at the highest policy levels of our government, in national electoral campaigns, in learned economic journals and is exemplified in the daily gyrations of the stock markets. **The debate seems unlikely to be resolved satisfactorily in one personal injury trial.**" (Emphasis supplied.)

Kelly, Sleman and **McWeeney**, *supra*, all accord—the computation of damages in order to determine impairment to earning power (after having made allowance for partial, as distinguished from total, disability as explained above) includes three elements, and no more: future normal earning power; expectancy (here work life); and a present value discount factor.

Of course, the discount factor should be determined from **current** rates of return. This is clear from such cases as **Chicago, R. I. & P. R. Co. v. Speth**, 404 F.2d 291, 296 (8th Cir. 1968), which held that juries should be instructed that "all future damages awarded should be reduced to their present worth taking into consideration factors of life expectancy and **current** rates of interest." (Emphasis supplied.) Many other cases throughout the federal system have spelled out what is obviously required by law and economics, namely, that it is the "present" or "current" investment rate which the jury is to find in arriving at an appropriate discount factor.[7]

Commentators accord: "The amount should be reduced to present worth of the entire verdict on this score on the basis of life expectancy, **current** legal rate of interest and taxes on investments of money, at **current** discount rates."[8] (Emphasis supplied.)

Blue's expert economist agrees. He testified that the common practice in his profession in arriving at a discount factor is to determine "what a prudent person might get

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[7] **Southern Railway v. Neese**, 216 F.2d 772, 775 (4th Cir. 1954), reversed on other grounds, 350 U.S. 77; **Virginian Ry. Co. v. Armentrout**, 166 F.2d 400 (4th Cir. 1948); **Petition of U. S. Steel**, 436 F.2d 1256, 1280 (6th Cir. 1970); **Southern Pac. Co. v. Klinge**, 65 F.2d 85, 87 (10th Cir. 1933); **Meehan v. Central R. Co.**, 181 F.Supp. 594, 610 (S.D.N.Y. 1960); **Brooks v. United States**, 273 F.Supp. 619, 634 (D.S.C. 1967).

[8] Oleck, **Damages to Persons and Property**, Central Book Co., 1961, p. 294.

on a safe investment at **current** investment rates" (R. 333; emphasis supplied).

Moreover, as **Kelly**, 241 U.S. at 490 (in the portion quoted above), and **Southern Pac. v. Klinge**, 65 F.2d at 87, make plain, the investment rate in the locality of plaintiff's residence is a crucial consideration in a jury's determination of the current investment rates.

The economic reason is quite simple and demonstrates the complete unsoundness of the appellate opinion below. The jury award for loss of future earning power is made **now**. Because plaintiff can be expected to invest this award **now** and draw a return on his investment throughout the period of his life expectancy,[9] the amount of the award must be reduced so that this return on investment will be taken into account. An investment by plaintiff **now** will be at current—not some unknown future—investment rate. Regardless of whether investment rates go up or down in the future, the plaintiff who buys a bond or other investment now, will obtain the prescribed rate on that investment throughout its life. And if the investment lasts over the span of his life, then throughout his life. If Blue invests his damages award in the American Telephone and Telegraph Company bonds which were specified in the evidence, he will obtain a rate of return of more than 8% on that investment no matter whether investment rates go up or down or remain the same over the next thirty years.[10]

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[9] Both parties and the district court were in accord that a work life expectancy of 33.6 years should be used in the computation.

[10] One of the two bond issues involved matures in the year 2002 and bears a specified rate of interest of 8.7%; the other issue matures in the year 2000 with a specified rate of interest of 8¾%. Since the testimony showed that both bonds were selling at around $107 instead of at the par figure of $100, the yield on the current market value would be more than 8% and less than the specified rate of interest at par.

Similarly, if he chooses to invest his award in the Government securities specified in the testimony, he will obtain a rate of return of more than 6% on that investment throughout this period. This is precisely the rate of interest or investment rate obtainable on safe investments over the period of plaintiff's work life expectancy—the very test which the court of appeals below held should be applied.

If Blue should need to go into principal during this time, surely a federal court and jury should not be required to assume that he will sell all of his bonds at once, spend part of the proceeds and then reinvest the rest in securities which bear a lower rate of interest. Such financial folly has never before been written into FELA or FSAA case law; it scarcely comports with the standard of prudence which the cases heretofore laid down.

The district court was completely correct in his charge to the jury on this point. As requested by counsel for Blue, he charged the jury that it should determine "the correct amount of money earned through a reasonable rate of interest over a period [of plaintiff's work life expectancy]" (R. 472). The court also charged the jury that a determination of such a rate of interest should be based upon "what the earning power of money would be at this time and place upon investments in safe securities by someone of plaintiff's financial experience and skill" (R. 476). And undergirding his entire charge on this point was the court's admonition to the jury that it was not bound by expert testimony in this area and that the testimony had been admitted only for the jury's guidance (e.g., R. 471-472).

The court of appeals below has cited no cases to support its holding that the district court erred in its charge. Its decision on this matter conflicts with the decisions of the several courts of appeals cited above and with the decision of this Court in **Kelly**, *supra*. These conflicts, too, justify the grant of certiorari to review the judgment below.

3. The appellate decision below conflicts with decisions of this Court regarding the scope of federal appellate review of jury awards of damages.

Blue's appeal to the court below was a remarkable, if not unique circumstance. Despite current inflationary economic conditions, of which all have common knowledge, it is singular to say the least to find a district judge under attack for having gravely abused his discretion when he declined to order a new jury trial on the ground that a $76,780 verdict for plaintiff is inadequate in the circumstances of this case. Even if liability were clear under FELA and FSAA (and it is far from clear in this case) an award of $76,780—measured by any economic standard—would seem an adequate award for the injuries which Blue suffered. But this jury—which deliberated for about seven hours[11] after a trial carefully and painstakingly supervised by the district court—could well have found that Western had not violated the FSAA; and that Blue—if not solely responsible for his accident—was at least guilty of contributory negligence so that his damages should be reduced under FELA in proportion to his negligence. Indeed the court of appeals below found the defenses on the merits "not insubstantial" (Opinion, p. 26).

The scope of federal appellate review of a jury award of damages on grounds of excessiveness or inadequacy is still unsettled. This Court up to now has considered it is barred by the Seventh Amendment from setting aside federal jury damage awards as inadequate or excessive.[12]

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[11] (R. 480-481).

[12] **Chicago, B. & Q. v. Chicago**, 166 U.S. 226, 242-243 ($1 verdict in condemnation proceedings); **Fairmount Glass Works v. Cub Fork Coal Co.**, 287 U.S. 474 (and cases cited); **St. Louis, etc. Ry. Co. v. Craft**, 237 U.S. 648; **Maxwell v. Dow**, 176 U.S. 581, 598; **Southern Ry. v. Bennett**, 233 U.S. 80, 87; **Herencia v. Guzman**, 219 U.S. 44, 45; **Eastman Kodak v. Southern Photo Materials**, 273 U.S. 359; **L. & N. v. Holloway**, 246 U.S. 525; cf. **Neese v. Southern Ry.**, 350 U.S. 77.

Moreover, this Court has taught that in FELA cases, jury findings should be reconciled by "exegesis if necessary" so that they may be upheld consistent with the requirements of the Seventh Amendment. **Gallick v. B.&O. R. Co.**, 372 U.S. 108, 119.

Surely the court below did not come close to "exegesis" to uphold the jury verdict in this case; and equally clearly, the district court was well within its sound discretion in denying Blue's motion for a new trial.

This circumstance, in itself, is a substantial reason for review. See **Rogers v. Missouri Pac. R. Co.**, 352 U.S. 500.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for writ of certiorari should be granted.

Respectfully submitted

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Certificate of Service

I, M. Roland Nachman, Jr., counsel for petitioner and a member of the Bar of the Supreme Court of the United States, certify that I have served a copy of the foregoing Petition for a Writ of Certiorari on Messrs. Rives, Peterson, Pettus, Conway & Burge, 17th Floor, 2121 Building, Birmingham, Alabama, attorneys for respondent, by depositing the same in a United States post office, with first class postage prepaid, addressed to them at the above address, this the 9 day of January, 1973.

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Of Counsel for Petitioner

APPENDIX A

[1*] In the
United States Court of Appeals
For the Fifth Circuit

No. 71-2289

Johnny F. Blue,
Plaintiff-Appellant,

versus

The Western Railway of Alabama,
Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Alabama

(November 21, 1972)

Before WISDOM, COLEMAN and SIMPSON,
Circuit Judges.

SIMPSON, Circuit Judge: Johnny F. Blue (Blue) brought suit against the Western Railway of Alabama (Western) pursuant to the provisions of the Federal Employers Liability Act, Title 45, United States Code, Section 51,[1]

* Numbers appearing in brackets in text indicate page numbers of original printed opinion.

[1] Title 45, U.S.C., Section 51:

"Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence definition of employees

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or

and the Federal Safety Appliance Act, [2] Title 45, United States Code, Section 11,[2] seeking damages for personal injuries he sustained on June 26, 1970 while serving as a member of a Western switching crew in the Chester Yards at Montgomery, Alabama. [3] The jury returned a verdict for Blue in the amount of $76,780.00. Dissatisfied with the amount of the award, Blue appeals from the judgment entered below assigning errors on the part of the district court in the exclusion of evidence and in its jury instructions. He seeks a new trial limited to the issue of damages. We reverse the judgment of the district court and remand for a new trial on all issues, liability as well as damages.

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between any of the States and Territories, or between the District of Columbia or any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

[2] Title 45, U.S.C., Section 11:

"Safety appliances required for each car; when hand brakes may be omitted

It shall be unlawful for any common carrier subject to the provisions of sections 11-16 of this title to haul, or per-

THE FACTS

On June 26, 1970, Blue was a member of a switching crew which was engaged in switching cars in the Chester Yards. He was working in the capacity of a "long field" man and his duties were to line switches out in the field so that when cars were cut loose from the train which was being disassembled they could be shunted onto tracks in accordance with a switching list which was in the possession of each crew member. Just prior to the accident which gave rise to this litigation, Blue was stationed at Switch No. 6. He had aligned this switch so that three hopper cars which the engineer was to "kick" down the lead track would go into Track No. 6. The three hopper cars were dispatched by the engineer and when they passed Switch No. 6, Blue threw the switch so that the next car scheduled to travel down the lead track would proceed past Switch No. 6 until it reached Switch No. 10, which had been set for shunting.

It appears from the evidence that Blue threw Switch No. 6 before ascertaining that the three hopper cars had cleared it. After throwing the switch he walked [4] away toward Track No. 22 with his back to the lead track and to the succeeding switching movement. Simultaneously, the next car, loaded wood rack No. 16557,

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mit to be hauled or used on its line, any car subject to the provisions of said sections not equipped with appliances provided for in said sections, to-wit: All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards, shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure handholds or grab irons on their roofs at the tops of such ladders: Provided, That in the loading and hauling of long commodities, requiring more than one car, the hand brakes may be omitted on all save one of the cars while they are thus combined for such purpose."

was sent down the lead track from a point several hundred feet west of Switch No. 6. While walking towards Track No. 22, Blue turned around and saw that the west end of the three hopper cars which had been shunted onto Track No. 6 had not completely cleared the lead track and that the wood rack car was heading toward a collision with the last hopper car. Rather than proceeding to Switch No. 6 and realigning it for Track No. 6 (so that the wood rack car could couple with the hopper car on impact), Blue ran to the wood rack car and jumped on it while it was moving at a speed of approximately five miles per hour. He climbed the ladder at the east end of the wood rack car where the hand brake was located, reached the platform adjacent to the hand brake, and applied the brake. Blue was unable to stop the wood rack car before it collided with the west end of the hopper car which was protruding from Track No. 6 onto the lead track. Blue was seriously injured in the ensuing collision between the two cars.

THE COMPLAINT

Blue's complaint set forth two counts as bases for recovery. The first count alleged a cause of action under the Federal Employers Liability Act (FELA), Footnote 1, supra, and charged that Blue had sustained serious personal injuries:

> ". . . as a proximate result, in whole or in part, of the negligence of the officers, agents, or em- **[5]** ployees of the defendant while acting within the line and scope of their employment by the defendant or by reason of a defect of insufficiency due to the negligence of the defendant, its cars, engines, appliances, machinery, track, roadbed, works or other equipment."

The second count pleaded a cause of action under the Federal Safety Appliance Act (FSAA), Footnote 2, supra. It incorporated the allegations of negligence under the first count, and continued:

> "Plaintiff avers that he was caused to sustain and suffer all of his aforesaid injuries and damages as a proximate result, in whole or in part, of the defendant hauling or permitting to be hauled or used on its line of railroad the aforesaid railroad car upon which plaintiff was riding as aforesaid that was equipped with an inefficient hand brake in violation of the aforesaid Federal Safety Appliance Act generally known as the 'Hand Brake Act', namely Title 45, U.S.C.A., Section 11."

THE ANSWER

In response to the complaint, Western interposed defenses based upon the alleged negligence of Blue.[3] **[6]** Under the statute, although the contributory negligence of Blue was only a pro tanto defense to the claim for damages, Western by its answer pleaded separate defenses: (a) Blue's contributory negligence, and (b) that

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[3] Title 45, U.S. Code, Section 53, provided:

"Contributory negligence; diminution of damages

In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

Blue's negligence was the *sole* proximate cause of the accident warranting the denial of any recovery.

Western charged that the accident would not have occurred had Blue remained at Switch No. 6 until he was sure that the three hopper cars had cleared the lead track, that it was his duty as the "long field" man to remain at the switch until the hopper cars were completely on Track No. 6, and that had he performed his prescribed duties he would have been able to turn Switch No. 6 back and thereby shunt the wood rack car onto Track No. 6 where it would have coupled on impact with the last hopper car. In addition, Western asserted that Blue, having failed to do his duty in the first place, could still have returned to Switch No. 6 after he saw that one of the hopper cars protruded onto the lead track and operated Switch No. 6 without danger. Instead, according to Western, Blue chose the most dangerous course of action possible under the circumstances: he boarded the moving wood rack car and attempted to halt its progress before it made contact with the protruding hopper car. Finally, under Western's contentions, Blue could have jumped from **[7]** the wood rack car to the ground prior to the impact when he became aware that he did not have enough time and space for stopping the moving loaded car with a hand brake.[4]

THE TRIAL

Dr. John F. Vallery, Jr., an Associate Professor of Economics at the University of Alabama, testified as an expert witness for Blue. Dr. Vallery was asked to compute Blue's average monthly income for a thirty-

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[4] Western also defended upon the basis that the hand brake was not defective in any respect. Under the proviso to Title 45, U.S.C., Section 53, supra at Footnote 3, of course, contributory negligence is not available as a defense in an action brought under the Safety Appliance Act.

month period during the years 1968 through 1970 based upon his gross monthly earnings during that period. The following discussion ensued:

"Q. (By Mr. Rutledge, counsel for Blue): Doctor, have you, based on the earnings that I gave you in 1968, '69, and '70, computed the average monthly income over that period of some thirty months, 1968, '69, and 70?

A. My computations were in average annual salary, which was eleven thousand, four hundred and thirty-three dollars. That is approximately a thousand dollars a month.

Mr. Nachman (counsel for Western): We object to that testimony, your honor, and move to exclude it. There is no testimony in the record to support what Dr. Vallery just assumed, and it is contrary to the hypo- **[8]** thetical question which counsel posed to him with regard to the earnings.

The Court: Are you talking about gross?

Witness: Yes, sir.

The Court: I sustain it, it will be excluded.

Q. Doctor, do you have a pencil and paper there with you?

A. Yes, sir.

Q. Would you make the calculation as to net earnings for 1968, subtracting nine thousand—subtracting one thousand, twenty-three dollars from nine thousand, seven hundred and seventy-five dollars?

A. Eight thousand, seven hundred fifty-two dollars, sir.

Mr. Nachman: Your honor, we——

Mr. Rutledge: You want me to take off more than income tax?

Mr. Byars: Yes, sir.

Mr. Nachman: Yes; there are other deductions.

Mr. Rutledge: It is contrary to my understanding your honor, as to——

The Court: No; if you are going to get to net, whatever the net is, I don't know what other deductions there may be, but we are interested in net; and if there are other things to take off to get to net, then you are required to do it." (Appendix, pages 152-153)

Later in the course of Dr. Vallery's direct testimony, the following exchange took place:

[9] "Q. Now, Doctor, going back to the figures which I gave you originally which were the gross figures without the mentioned deductions, that is the amount of earnings; have you computed the average monthly earnings based on the gross figures?

Mr. Nachman: Object again.

The Court: I sustain it.

Mr. Rutledge: May I——

The Court: I will let you make your record at the next recess.

Mr. Rutledge: May I explain my position? It is our position, your honor, that the tax situation as of the time that these various returns were filed may or may not be the same.

The Court: Well, the income may or may not be the same, too.

Mr. Rutledge: That—that is correct, your honor; and what I wanted to do was to give the jury both the net and the gross so that they may make their judgment as to——

The Court: I sustain objection.

Mr. Rutledge: Thank you, your honor.

The Court: On testimony based on gross.

Mr. Rutledge: All right, sir.

The Court: To the extent that it may be material to any verdict that you might request the jury to return in the case." (Appendix, pages 155-156)

On direct examination, Dr. Vallery testified that, in his opinion, the interest rate available on safely invested funds over the period of Blue's work life ex- [10] pectancy would be 5.5% per year. Dr. Vallery, on cross-examination, acknowledged that high grade corporate bonds were yielding returns in excess of eight percent per year. On redirect examination, Dr. Vallery stated that the then current interest rates were at a 100 year high.[5]

At the conclusion of the evidence, the district judge charged the jury with respect to net earnings as follows:

> "Now, one of the items of damages claimed by the plaintiff is compensation for wages lost from his employment by the railroad company, or any other employment, as a proximate consequence, in whole or in part, of the accident on June 26, 1970. The parties have introduced evidence as to the amount of wages earned by Blue for various periods preceding this June 26, 1970, date. You may consider this evidence in determining the amount of *net* wages, if any, that Blue lost as a proximate consequence, in whole or in part, of the injuries suffered in this accident on June 26, 1970. Now, I tell you that you are not bound by that evidence. It is your duty to determine the amount of wages lost, *net* wages lost, by Blue and to compensate him for that loss if you are reasonably satisfied that he's entitled to recover." (Emphasis supplied)

[11] As to the appropriate discount rate to be applied to determine the present value of an award for lost future earnings, the district court instructed the jury in the following terms:

> "If you make an award in this case, and if a portion of your award is based upon loss of future earn-

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[5] The verdict was returned May 12, 1971.

ings, then you must determine from the evidence in this case these things: What the plaintiff, Blue's, future normal earning power would have been if he had not suffered any injury; what Blue's reasonable work life expectancy would have been; the degree or percentage of Blue's partial disability proximately resulting from the defendant's fault, if any, and the consequent impairment to Blue's future earning power from such disability; and the appropriate reduction to present cash value of the amount of such loss of future earnings, if any, based upon a rate of interest which you fix as reasonable and right according to the evidence in this case. In fixing the amount of such reduction, you must do so upon *the basis of what the earning power of money would be at this time and place* upon investments in safe securities by someone of plaintiff's financial experience and skill." (Emphasis supplied)

THE CONTENTIONS ON APPEAL

On appeal, Blue asks that a new trial be awarded as to damages only, retaining the trial jury's determination as to liability. In this quest for a new trial, Blue argues that the district court erred in the following [12] respects: (1) the jury was not permitted to consider the history of Blue's gross earnings; (2) the jury was instructed to consider and compute only the amount of net wages lost by Blue as a proximate result of the defendant's breach of duty; and (3) the jury was instructed to reduce its award for lost future earnings to its present value by applying the rate of interest in safe securities then and there in effect.

GROSS VERSUS NET EARNINGS

Professors Harper and James, in discussing the impact of the Internal Revenue Code's exemption from

federal taxation of damages awards received for personal injuries or sickness, Title 26, U. S. Code, Section 104(a)(2), observe:

"The Internal Revenue Code lists as an exemption from gross income 'The amount of any damages received (whether by suit or agreement) on account of personal injuries or sickness. . .' Thus all compensatory damages in personal injury accident cases are tax exempt though they often include compensation for loss of past and estimated future earnings which would have been taxable if plaintiff had not been injured and had been paid wages or salary. It has been suggested that 'the treatment of lost earnings is rooted in emotional and traditional, rather than logical, factors'. We shall not here try to weigh the wisdom of the exemption. Rather we shall take the exemption as our starting point and try to see [13] how it does and how it should affect the assessment of damages.

"The first question is this: should the probable gross earnings, or estimated net income after taxes, be taken as the measure of recovery for loss of earnings? The argument for computing damages on estimated income after taxes is a clear one: this will measure the actual loss. If plaintiff gets, in tax free damages, an amount on which he would have had to pay taxes if he had gotten it as wages, then plaintiff is getting more than he lost.

"Not many decisions explicitly treat this question. Most of those that do consider it refuse to deduct taxes on the ground that future tax rates and the way they may affect this particular plaintiff are too speculative. It has also been suggested that the tortfeasor ought not to get the benefit of this exemption which comes from a 'collateral source' but this argu-

ment overlooks the compensatory theory of damages. It is more forthright to say, as the Missouri court has, that the rule of compensation here must wield to the practical difficulty of making a forecast.

"Even in this form the argument is weak. In the first place it has no proper application to damages for *past* losses. In measuring them the tax can be computed and should be deducted. Moreover future taxes are no more specu- **[14]** lative than many other items that go into prophecies about future losses in this uncertain world of ours—witness the future earnings of a young child or the future trends of the dollar's value. As long as our system stays wedded to the single lump sum recovery, our courts simply have to speculate about the uncertainties of the future. With anything as sure as 'death and taxes', the courts are avoiding their responsibilities when they decline to make the best guess they can, once all the reasonably available evidence has been brought before them. It is noteworthy that the British House of Lords has recently held that damages for past and prospective earnings should be based on estimated net income after taxes." "The Law of Torts", Harper and James, § 25.12, pages 1326-1327.

The leading theoretical exposition of the merits of not restricting the jury to a computation of the plaintiff's net earnings (after taxes) appears in Judge Friendly's opinion for the Second Circuit in *McWeeney v. New York, New Haven, and Hartford Railroad Company*, 2 Cir. 1960, 282 F.2d 34, 36-39, cert. denied 1960, 364 U.S. 870, 81 S.Ct. 115, 5 L.Ed2d 93:

"The instruction here requested and refused illustrates the delusive simplicity with which the subject has been invested. Defendant wished the jury to be told merely that 'If your verdict is in favor of plain-

tiff, you must calculate any past or future loss of earnings on [15] the basis of his net income after deduction of income taxes.' All of us agree the jury needs more guidance than that. But what is the alternative? The trial court could begin by instructing that under the optional tax provided in § 3 of the Internal Revenue Code, which McWeeney was entitled to elect, the tax on a bachelor's income of $4,800 would have been $773. This is still simple enough but the jury must determine not what McWeeney's tax on $4,800 now is but what it would be over his expectancy. In these lower brackets the amount of the tax and its percentage relation to earnings are enormously affected by the number of exemptions. The simple act of matrimony, coupled with the filing of a joint return, would reduce McWeeney's tax from $773 to $620. Is the jury to consider the likelihood of this not unusual occurrence? If the lady brought two children with her, or if these were produced in the ordinary way, the tax would be cut in half, to $380. Each additional child would bring a further tax saving of $110, so that a total of five would make the tax nominal. While such fecundity might be unlikely in a plaintiff of 39 the rule here framed for McWeeney must apply to men who evidence greater interest in marriage and parenthood, and the rise in the birth rate is a phenomenon of our age. Is the jury in each case to speculate, or hear testimony, on the procreative proclivities and potentialities of the plaintiff and his spouse? Moreover, children are by no means the only source of exemp- [16] tions; § 152 of the Code lists nine other categories. Nor will it do to say that this is over-refinement. If a defendant claims that a plaintiff in these brackets would have had to pay 20% of his income in taxes, the court cannot deprive the plaintiff of an opportunity of showing that he would not have paid anything of the kind, and once

the rule were adopted, we see no way of eliminating the question of potential babies and the exemptions they trail with them.

"Having duly instructed the jury how to estimate the number of plaintiff's probable exemptions, and the dates when these will come into being, and on rate brackets and deductions, and the treatment of other income of the plaintiff not affected by the accident, the court would necessarily encounter another problem. Even the best designed instruction that stopped at that point would be unfair to the plaintiff. This is because, as proponents of the instruction recognize, the product of plaintiff's lost earning power ex-tax and his expectancy will have been discounted to produce 'that sum of money which if invested at a fair rate of return will yield annually the amount by which the plaintiff's earning capacity has been lessened and which will at the time of end of the plaintiff's life expectancy be reduced to zero. This takes into account the fact that money earns interest each year; and it should be re- [17] membered that this interest is taxable. Therefore, if a court is going to use income after taxes as a measure of plaintiff's loss, it must add back the taxes which would be due on the interest earned—else the award would not fully compensate for the loss.'

"All this is simple enough to state but how is the jury to apply it? If we suppose that plaintiff would purchase an annuity with the lumpsum previously determined, it will hardly help the jury to be told, in the language of § 72(b) of the Internal Revenue Code, that 'Gross income does not include that part of any amount received as an annuity under an annuity, endowment, or life insurance contract which bears the same ratio to such amount as the investment in the contract (as of the annuity starting date) bears to

the expected return under the contract (as of such date).' Of course the court could itself calculate the exclusion ratio and charge what proportion of the annual payments would be taxable, thus leaving to the jury only the task of determining the amount of each annual payment that would be taxable, the tax thereon, and the discounted amount of the sum of such tax payments, and adding this to the ex-tax award. But here a new complication seems to arise. For a portion of the periodic payments on this sum, which is to be added to fund plaintiff's tax liability, would itself be subject to tax.

[18] "It is answered that, however unrealistic it may be to suppose that a jury could properly make the series of calculations required, the worst result from giving an instruction would be better than the best result from not giving one. This ignores that, by imposing on the jury a task that the jury cannot reasonably be expected to perform, we would be likely to impair the quality of its performance in areas of its true competence. It ignores also that although failure to instruct the jury to reduce a verdict to take account of income taxes on plaintiff's lost earning power, when viewed in isolation, may tend to make verdicts too high, there are at least two other factors that countervail this in the ordinary case.

"The first is inflation. Though some courts have sanctioned instructions permitting the jury to take into account inflation between the injury and the trial, there is little or no authority in favor of charging the jury to take future inflation into account, see 2 Harper and James, The Law of Torts, § 25.11 (1956). Yet there are few who do not regard some degree of continuing inflation as here to stay and would be willing to translate their own earning power into a fixed annuity, and it is scarcely to be expected

that the average personal injury plaintiff will have the acumen to find investments that are proof against both inflation and depression—a task formidable for the most expert investor. The effect of in- [19] flation of 1% a year over McWeeney's 29-year expectancy at trial would go a long way toward offsetting any excess in the verdict due to failure to deduct income tax.

"The second offsetting factor is that the supposedly overcompensated plaintiff does not retain his entire recovery or anything like it. Whatever the reasons of history or policy for the American practice of generally not awarding attorneys' fees to the successful party, see Goodhart, Costs, 38 Yale L.J. 849, 872-78 (1929), we can hardly shut our eyes to this when asked to require the jury to take another extrinsic factor into account—particularly when we know that even court-prescribed maximum scales of contingent fees, which have been attacked by counsel as inadequate, provide either a sliding scale ranging from 50% down to 25% or a flat amount of 33⅓%, N.Y.App.Div. 1st Dept., Special Rules Regulating the Conduct of Attorneys and Counsellors at Law, Rule 4.

"There may be cases where failure to make some adjustment for the portion of a plaintiff's or decedent's earnings that would have been taken by income taxes would produce an improper result; but these are at the opposite end of the income spectrum from McWeeney's. For example, if a plaintiff or a plaintiff's decedent, had potential earnings of $100,000 a year, more than half of which would have been [20] consumed by income taxes, an award of damages based on gross earnings would be plainly excessive even after taking full account of the countervailing factors we have mentioned. We find it hard to believe that juries would render such a verdict even in the

absence of instruction; but in this limited class of cases the court may properly give some charge or, perhaps better, use the tools provided by Fed.R.Civ. Proc. 49, and an excessive verdict may always be set aside. In such cases, which in proportion are relatively few, the criticism that the whole process of computation is unrealistic has a considerable measure of validity, the projection of future income at such levels being itself extremely conjectural, and the slope of the tax progression curve declines although only after having reached such a high plateau that earnings above it have relatively slight value. Such cases are in sharp contrast to the great mass of litigation at the lower or middle reach of the income scale, where future income is fairly predictable, added exemptions or deductions drastically affect the tax and, for the reasons indicated, the plaintiff is almost certain to be undercompensated for loss of earning power in any event. To be sure a practice of refusing the instruction in most cases but requiring some adjustment in a few lacks precision and elegance; but we cannot disregard the practicalities of judicial administration and 'the law is untidy as life with which it deals.' Just where the line should be drawn **[21]** must be left, as so much is, to the good sense of trial judges, whether acting with a jury or without. Certainly the line was not approached here." (Footnotes omitted)[6]

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[6] *McWeeney* was preceded in the Second Circuit by *Stokes v. United States*, 2 Cir. 1944, 144 F.2d 82, 87, where the Court held in an appeal from a non-jury trial under the Suits in Admiralty Act that it was not error for the trial court to refuse to make deductions for future income taxes in computing expected earnings:

"[s]uch deductions are too conjectural".

For subsequent refinements of the *McWeeney* rule, no more than peripherally pertinent to our problem here, see among other Second Circuit cases, the following: *Montpelier v. United States*, 2 Cir. 1963, 315 F.2d 180, holding in a federal tort claim case

This Court has not previously considered this precise issue.[7] In *Phoenix Indemnity Co. v. Givens*, 5 Cir. 1959, 263 F.2d 858, the defendant complained that the trial judge had erred in admitting evidence as to the gross amount of the plaintiff's earnings. We perceived [22] no error in that ruling and indicated that the defendant possessed the option of introducing evidence to contradict or to explain that gross earnings are not synonymous with take-home pay. We held, in *Prudential Insurance Company of America v. Wilkerson*, 5 Cir. 1964, 327 F.2d 997, that the trial court had properly refused to instruct the jury that the amount of the recovery was not subject to federal or state income taxes. In *Hartz v. United States*, 5 Cir. 1969, 415 F.2d 259, a suit against the United States under the Federal Tort Claims Act for wrongful death, an annual income of $65,000.00 was involved and we held that it was appropriate for the district court (sitting without a jury) to consider the plaintiff's income tax liability on lost future earnings. In dictum we noted:

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that it was not error for the trial judge to compute loss for future earnings by ignoring impact of income taxes on a projected annual income of $11,150.00, but indicating that this figure was close to being large enough to fall into the *McWeeney* exception; *Cunningham v. Rederiet Vendeggen A/S and M/S Trolleggen*, 2 Cir. 1964, 333 F.2d 308, expanding the rule to non-jury trials; *LeRoy v. Sabeena Belgian World Airlines*, 2 Cir. 1965, 344 F.2d 266, holding that anticipated immediate future income of $16,000, reaching $25,000 for nine years brought that case within the *McWeeney* exception, and that it was not error for the trial court (non-jury) in its computations to make deductions for future income taxes; and *Petition of Marina Mercante Nicaraguense, S.A.*, 2 Cir. 1966, 364 F.2d 118, reiterating *McWeeney's* application to non-jury trials.

[7] See *Greco v. Seaboard Coast Line R. R. Co.*, 5 Cir. 1972, ——— F.2d ——— [No. 71-3522, decided July 12, 1972] and cases there cited, including *Prudential Insurance Company of America v. Wilkerson*, text infra, for our latest treatment of the allied question of the propriety of an instruction as to jury awards being non-taxable.

"It has been frequently thought that in the ordinary jury-tried personal injury suit, it would introduce too many complicating factors to permit the ordinary defendant to seek a reduction of the potential claim against him by giving consideration to the matter of income taxes that would have been paid by the decedent. This is understandable and we find no fault with the decisions that in personal injury actions *between private parties* no consideration need be given to the incidence of taxation." 415 F.2d at 264-265.

With all deference to Professors Harper and James, we are of the opinion that the rule enunciated in *McWeeney*, supra, is both sound and in harmony with this Court's prior decisions and observations in this [23] area. Accordingly, we hold that the district court erred in excluding from the jury's consideration evidence of Blue's gross earnings history and in instructing the jury that, in making an award for future loss of earnings, they were to concern themselves only with net income.[8] The jury should have been permitted to receive the evidence as to gross earnings offered by the plaintiff.

THE APPROPRIATE INTEREST RATE

As noted earlier in this opinion, the district court charged the jury that they should reduce any award for loss of future earnings through the use of an interest rate "at this time and place upon investments in safe

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[8] Several of our sister courts of appeals have arrived at a similar conclusion. See, e.g., *Boston and Maine R.R. v. Talbert*, 1 Cir. 1966, 360 F.2d 286; *Domcracki v. Humble Oil & Refining Co.*, 3 Cir. 1971, 443 F.2d 1245, cert. denied 1971, 404 U.S. 883, 92 S.Ct. 212, 30 L.Ed.2d 165 (cautionary instruction to be given at request of defendant to the effect that personal injury awards are not subject to federal income taxation); *United States Steel Corp. v. Lamp*, 6 Cir. 1970, 436 F.2d 1256; *Cox v. Northwest Airlines, Inc.*, 7 Cir. 1967, 379 F.2d 893.

securities by someone of plaintiff's financial experience and skill". It is undisputed that at the time of the trial, mid-May, 1971, interest rates payable upon high-grade corporate securities were at an historic high. We take judicial notice of the fact that such corporate yields have dropped substantially since the trial in this case.

In *Chesapeake & Ohio Railway v. Kelly*, 1916, 241 U. S. 485, 36 S.Ct. 630, 60 L.Ed. 1117, the Supreme Court held that in actions brought under the FELA, it was mandatory that wards for loss of future earnings be **[24]** reduced to present value through the use of an appropriate interest rate. But the Court did not have occasion to deal with a situation wherein interest rates were fluctuating to a significant extent, such as the case we face here.

In discussing the disadvantages of a single lump sum recovery system, Harper and James note:

> "Another important aspect of a single recovery is the burden it casts on the successful plaintiff of wise investment and of providence, wherever the recovery must be relied on to take care of future needs. In 1947 the Railroad Retirement Board published the results of a study of work injuries in the railroad industry for the years 1938-1940. As part of that study some 1700 employees and survivors were interviewed as to how they disposed of their settlement payments, which had been by way of lump sum. The report concluded (on this point) that as to such settlements 'their disposition is not generally such as to offer assurance of a stable substitute for the loss of wages incurred in the severe and fatal injuries'." "The Law of Torts", Harper and James, § 25.2, pages 1303-1304.

We are of the view that the district court erred in instructing the jury to reduce any award for loss of

future earnings through the utilization of an interest rate equivalent to the return on high-grade corporate securities *prevailing at the time and place of the trial.* The district court's instruction was clearly predicated [25] upon the assumption that Blue, upon receipt of an award for loss of future earnings, would immediately invest that recovery in long-term, high-quality corporate securities and hold those securities until maturity (assuming that the securities were not called by the issuing corporations). That assumption overlooks the distinct possibility that Blue might well encounter a transient need for liquid funds to meet an emergency situation and would not be able to reinvest the funds at the same high rate of return once the emergency situation was over. In other words, the district court's instruction envisioned no resort on Blue's part to the principal of the fund during the remainder of his projected work-life. In that respect, the district court's conception of the role of the single lump sum recovery was, in our opinion, distorted and erroneous. We hold that the jury should have been instructed to reduce the award for loss of future earnings, if any, through the use of an appropriate interest rate *over the period of the remaining anticipated work-life* of the plaintiff, Blue. Although not a scientifically perfect method of dealing with fluctuating interest rates, at least such an instruction would have enabled the jury to consider the fact that corporate yields at the time of the trial were unusually high and were clearly subject to downward movements in the months and years to come.

CONCLUSION

Blue, following the rendition of the verdict in this case, moved the district court for a new trial limited to the issue of damages or, in the alternative, for a new trial on all issues. That motion was overruled and a similar request has been made to this Court on appeal.

[26] Because Western so strenuously and vigorously pressed its mitigation defense of Blue's contributory negligence during the district court proceedings and because that defense was not insubstantial, we have no alternative but to remand this matter for a new trial on all issues. As the Supreme Court noted in *Norfolk Southern Railroad Co. v. Ferebee*, 1915, 238 U.S. 269, 35 S.Ct. 781, 59 L.Ed. 1303, partial reversals and remands in FELA cases are not favored unless it conclusively appears that such a disposition will not prejudice the party which has not prevailed on appeal. We have no way of knowing to what extent the jury reduced its award for Blue on the basis of a finding of Blue's contributory negligence. Such a situation would and should have been avoided through the use of special interrogatories under Rule 49, Federal Rules of Civil Procedure.

The judgment of the district court is Reversed and the cause is Remanded for a new trial as to all issues, liability as well as damages.

APPENDIX B

United States Court of Appeals for the Fifth Circuit

October Term, 1971

No. 71-2289

D. C. Docket No. CA-3243-N
Johnny F. Blue,
Plaintiff-Appellant,

versus

The Western Railway of Alabama,
Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Alabama
Before WISDOM, COLEMAN and SIMPSON, Circuit Judges.

JUDGMENT

(Filed Dec. 14, 1972)

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Alabama, and was argued by counsel:

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court for a new trial as to

all issues, liability as well as damages, in accordance with the opinion of this Court;

It is further ordered that defendant-appellee pay to plaintiff-appellant the costs on appeal to be taxed by the Clerk of this Court.

November 21, 1972

Issued as Mandate: Dec. 13, 1972.

A true copy

Test:

EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals,
Fifth Circuit
By MARYETTE K. FARLEY
Deputy
New Orleans, Louisiana

(Seal)

APPENDIX C

FEDERAL EMPLOYERS' LIABILITY ACT
(45 U.S.C. § 51)

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in the case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

FEDERAL SAFETY APPLIANCE ACT
(45 U.S.C. § 11)

It shall be unlawful for any common carrier subject to the provisions of sections 11 to 16 of this title to haul,

or permit to be hauled or used on its line, any car subject to the provisions of said sections not equipped with appliances provided for in said sections, to wit: All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure handholds or grab irons on their roofs at the tops of such ladders: *Provided,* That in the loading and hauling of long commodities, requiring more than one car, the hand brakes may be omitted on all save one of the cars while they are thus combined for such purpose.